Filed 10/13/20 In re Alexander C. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ALEXANDER C., a Person Coming Under the Juvenile Court Law.	B304128 (Los Angeles County Super. Ct. No. 18CCJP00695A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ELIZABETH C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Affirmed.

Ronald D. Tym for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kim Nemoy, Assistant County Counsel, and Tracey Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

Elizabeth C., the mother of two-year-old Alexander C.,[1] appeals the juvenile court's order summarily denying her request for a modification of court order and the court's order terminating her parental rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Dependency Determination*

Seven-week-old Alexander was taken into custody by the Los Angeles Department of Children and Family Services (Department) on January 29, 2018 after police responded to an emergency call that Elizabeth was behaving erratically in a restaurant, yelling at patrons and holding Alexander by the head while swinging him around. Placed on a temporary Welfare and Institutions Code section 5150[2] hold, Elizabeth told the evaluator she had been drinking and smoking marijuana. She also said Alexander had demons and serpents in him and would be crucified.

On March 22, 2018 the juvenile court sustained a petition pursuant to section 300, subdivision (b), finding Alexander was at

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[1] According to his birth certificate, "Alexander" is the child's middle name. However, the petition was filed prior to issuance of the birth certificate and used Alexander as the first name. The child is referred to by both his first and middle names throughout the record. For simplicity we refer to him as Alexander to conform to the caption of the case.

[2] Statutory references are to this code.

substantial risk of serious physical harm because Elizabeth had a history of mental and emotional problems, including a diagnosis of bipolar disorder, that rendered her incapable of providing Alexander with regular care and supervision. At the disposition hearing on April 12, 2018 Alexander was declared a dependent of the court; removed from Elizabeth's physical custody based on a finding, by clear and convincing evidence, there would be a substantial danger to the child's physical health and safety if he were returned home; and placed in foster care. Family reunification services were ordered for Elizabeth, including completion of a parenting course, a psychiatric evaluation and individual counseling. Elizabeth was also ordered to take all prescribed psychotropic medications and submit to five drug tests. The court ordered monitored visits twice a week for two hours per visit.

2. *The Six-month Review Hearing*

In its status review report for the six-month review hearing (§ 366.21, subd. (e)) filed September 19, 2018, the Department reported Elizabeth had been seeing a psychiatrist and a therapist and was consistently taking her prescribed medication. Elizabeth was attending a parenting course and had consistently tested negative for drugs. However, the Department expressed concern Elizabeth had demonstrated an inability to appropriately supervise Alexander during visits. The monitor said Elizabeth was not alert or focused on Alexander's activities during visits and she had repeatedly allowed him to engage in potentially dangerous behavior such as playing with an eyeliner pencil and almost pulling a cabinet down on top of him. When asked about these incidents by the social worker, Elizabeth stated, "You know things happen to children." The Department recommended the

court terminate reunification services because Elizabeth had "shown poor ability to appropriately keep her son safe while under her care and supervision" and had "demonstrated a lot of difficulty in comprehending age appropriate supervision."

At the hearing on October 19, 2018 the juvenile court found Elizabeth had made substantial progress on her case plan and ordered the Department to continue to provide family reunification services.

3. *The 12-month Review Hearing and Termination of Reunification Services*

A contested review hearing was held on May 22, 2019 and June 5, 2019. Elizabeth's therapist and psychiatrist each testified Elizabeth had been consistently attending therapy and had been compliant with her medication, although the therapist stated Elizabeth had expressed some skepticism she actually suffered from bipolar disorder.

Alexander's foster mother, Adriana B., testified Alexander was placed with her when he was seven weeks old. Adriana had monitored many of Elizabeth's visits with Alexander and reported a series of incidents during which she had to intervene because Elizabeth had not been adequately supervising Alexander. On one occasion Alexander had tried to leave the visiting room, and Elizabeth pulled him back by his arm, causing him to bump his head. At other visits Alexander reached for toys and books on high shelves, causing them to fall or almost fall on him. He also stood on a chair by himself while Elizabeth watched. In addition, Elizabeth tried to feed Alexander inappropriate items such as a whole cashew, tea and coffee.

Adriana also described a visit on January 18, 2019 during which Alexander tripped over Elizabeth's outstretched legs and

hit his head on a table, resulting in a black eye. Adriana took Alexander to urgent care for treatment. Elizabeth did not go with them to urgent care and later told the social worker the black eye did not look that bad. On February 22, 2019 Adriana monitored a visit at a park during which Elizabeth let Alexander play with sticks and rocks and walk too close to the parking lot. At one point during the visit Alexander walked to the edge of a pond by himself and fell near the edge with his legs landing in the water.

Elizabeth testified she accepted her diagnosis of bipolar disorder and intended to continue treatment and take prescribed medication. She had completed two parenting courses and had started narcotics anonymous but did not yet have a sponsor. Elizabeth admitted using marijuana in March 2019, just two months prior to the hearing; but she insisted it was the only time she had used marijuana during the pendency of the case and it would not happen again. Elizabeth did not recall some of the incidents Adriana had described as occurring during her visits with Alexander. Regarding Alexander's visit to urgent care after hitting his head, Elizabeth explained she did not go with him because she believed Adriana could handle it and she was not invited to go. She also stated the pond Alexander had stumbled into was within a children's play area and was only a few inches deep. She said Alexander had not been in danger because she had been with him.

The Department, joined by Alexander's counsel, recommended the juvenile court terminate Elizabeth's reunification services. While recognizing Elizabeth had made progress in therapy, the Department remained concerned Elizabeth could not maintain a safe environment for Alexander.

She had repeatedly demonstrated an inability to closely supervise Alexander and prevent him from engaging in potentially dangerous behavior.

The juvenile court found by a preponderance of the evidence that returning Alexander to Elizabeth's custody would create a substantial risk of serious harm. The court was particularly concerned Elizabeth had used marijuana only two months before the hearing, which, it stated, was "either an issue of extremely poor judgment, or it is a symptom of her mental health issues that she can just not appreciate the seriousness of her behavior."[3] Regarding the safety concerns raised by the Department, the court stated none of the incidents alone warranted a finding Alexander would be at risk of harm if returned to Elizabeth but "taken in totality," and coupled with Elizabeth's apparent indifference when Alexander was taken to urgent care, the incidents raised concerns Elizabeth could not appropriately care for Alexander. The court terminated Elizabeth's reunification services and set a permanency planning hearing.

Following the ruling terminating her reunification services, Elizabeth filed a writ petition pursuant to section 366.26, subd. (*l*), which we denied on the merits on September 10, 2019.

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[3] The reporter's transcripts of the May 22, 2019 and June 5, 2019 proceedings were not included in the record on appeal, but were included in the proceedings on Elizabeth's writ petition filed in June 2019. (See *Elizabeth C. v. Superior Court* (Sept. 10, 2019, B298804) [nonpub. opn.].) We augment the record on our own motion with these transcripts. (Cal. Rules of Court, rule 8.155(a)(1)(B).)

(See *Elizabeth C. v. Superior Court* (Sept. 10, 2019, B298804) [nonpub. opn.].)

4. *Section 366.26 Report*

In reports filed prior to the selection and implementation hearing the Department recommended Elizabeth's parental rights be terminated and Adriana and her husband be designated as Alexander's prospective adoptive parents. The Department reported that Adriana and her husband had been caring for Alexander since he was two months old and had developed a parent-child relationship with him. Although Elizabeth had continued to visit Alexander since the termination of reunification services, she generally just watched him play with toys and did not actively engage with him.

5. *Elizabeth's Section 388 Petition*

On January 13, 2020, the day of the selection and implementation hearing, Elizabeth filed a section 388 petition seeking to modify the June 5, 2019 order terminating reunification services. The petition sought reinstatement of reunification services, a home-of-parent order and cancellation of the section 366.26 hearing. Elizabeth argued the court's justifications for terminating reunification services were insufficient, the foster mother's testimony regarding safety concerns was unreliable and the Department had failed to provide services ordered by the court. Elizabeth submitted a declaration in support of the petition, which stated the pond in which Alexander had fallen during a visit was only an inch deep, she had completed two parenting courses, she had used marijuana only once during the case and she did not go to the hospital with Alexander when he got a black eye because the

foster mother had previously not allowed her to go to medical visits. Elizabeth also stated she had continued to visit Alexander since the June 5, 2019 hearing, had continued to attend therapy and was taking all prescribed medications. Attached to the declaration were photographs of the pond and a certificate of completion for a parenting course.

6. *The Section 366.26 Selection and Implementation Hearing*

On January 13, 2020, at the outset of the section 366.26 hearing, the court summarily denied Elizabeth's section 388 petition. The court found Elizabeth had not presented any new evidence or change of circumstances and the proposed change of order did not promote Alexander's best interests.

The Department, joined by Alexander's counsel, requested the court terminate Elizabeth's parental rights. Elizabeth argued the court's prior findings were incorrect and she had fully complied with her case plan. The juvenile court terminated parental rights, finding by clear and convincing evidence Alexander was adoptable and no exception to adoption applied.[4] The court ordered adoption to continue as Alexander's permanent plan and designated Adriana and her husband as the prospective adoptive parents.

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[4] The court also terminated the parental rights of Gregory S., Alexander's biological father.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion by Summarily Denying the Section 388 Petition*

a. *Governing law*

Section 388 provides for modification of juvenile court orders when the moving party presents new evidence or a change of circumstances and demonstrates modification of the previous order is in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both elements. (*In re K.L.* (2016) 248 Cal.App.4th 52, 61; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157; see Cal. Rules of Court, rule 5.570(d)(1).)

The petition should be liberally construed in favor of granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; accord, *In re K.L., supra*, 248 Cal.App.4th at p. 61.) The petition may not consist of "general, conclusory allegations." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) "Successful petitions have included declarations or other attachments which demonstrate the showing the petitioner will make" at the hearing. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) When determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re K.L.*, at p. 62; *In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

We review the summary denial of a section 388 petition for abuse of discretion. (*In re K.L., supra*, 248 Cal.App.4th at p. 61; *In re A.S.* (2009) 180 Cal.App.4th 351, 358.) We may disturb the juvenile court's exercise of discretion only in the rare case when the court has made an arbitrary, capricious or patently absurd determination. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

b. *Elizabeth's section 388 petition failed to state a prima facie case for modification of a prior order*

Elizabeth contends her section 388 petition sufficiently stated a prima facie case for modification of the court's order terminating reunification services. The petition identified the following purportedly new evidence: a photograph showing the depth of the pond in which Alexander fell during a visit; a certificate of completion indicating Elizabeth had completed a parenting course in November 2018, and Elizabeth's statement she did not ask to accompany Alexander to urgent care after his black eye because she had previously been denied the opportunity to attend doctor visits.[5] However, evidence regarding each of

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[5] Elizabeth also argues the Department's failure to provide her drug testing since the prior hearing constitutes new evidence and a change in circumstance. However, it is unclear testing was actually ordered. While the minute order for the June 5, 2019 hearing states Elizabeth was ordered to test, the reporter's transcript includes only a vague reference to testing: "Basically what [the] court finds [is] that mother hasn't made significant progress. That's the standard at these proceedings. We are only two months from the 22 entitled limitation, which would be a month and a half. So extending this case to a 22 would not accomplish much. She needs to be put on testing again and demonstrate she's complied with parenting classes that were not demonstrated [as] having been completed. She needs to

these matters had been submitted at prior hearings, including by Elizabeth's testimony. Despite having reviewed that evidence, the court concluded reunification services should be terminated. Reargument of already determined issues and introduction of previously available evidence are not the proper functions of a section 388 petition. (See *In re D.B.* (2013) 217 Cal.App.4th 1080, 1092 ["'[t]he term "new evidence" in section 388 means material evidence that, with due diligence, the party could not have presented at the dependency proceeding at which the order, sought to be modified or set aside, was entered"']; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451 [parent failed to state changed circumstances in support of section 388 petition where alleged facts had previously been submitted to court].)

Elizabeth also asserted she demonstrated changed circumstances based on her activities since reunification services had been terminated. She stated that, since the prior hearing, she had continued to visit Alexander, attend therapy and take all prescribed medication. However, Elizabeth had been visiting Alexander and complying with treatment at the time the court

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demonstrate she has insight to parent this child, which I don't think she's been able to do." In context, the court's comment appears to be a recitation of what Elizabeth would need to do if the court were to extend reunification services to the 18-month hearing, which it declined to do, not an order for testing. (See *In re Nia A.* (2016) 246 Cal.App.4th 1241, 1247, fn. 1 [oral pronouncement generally prevails over inconsistent minute order]; *In re A.C.* (2011) 197 Cal.App.4th 796, 799-800 [same].) Regardless, even if the court had ordered testing and the Department had not provided it, Elizabeth has failed to show how testing would have supported an argument that reinstatement of services would be in Alexander's best interests.

terminated services, yet the court found that behavior insufficient to continue reunification services. Without any supporting detail, the mere assertion she had continued positive behavior is insufficient to state a prima facie case of material new evidence of changed circumstances sufficient to sustain a section 388 petition.

Elizabeth's petition also failed to address how her conduct since the prior hearing supported a finding reunification would be in Alexander's best interests. (See *In re J.C.* (2014) 226 Cal.App.4th 503, 527 [a parent's petition to reopen reunification efforts "must establish how such a change will advance the child's need for permanency and stability"]; see also Cal. Rules of Court, rule 5.570(d)(1) [juvenile court may summarily deny section 388 petition that fails to show a change of circumstances or new evidence that demonstrates a modification of a prior order would promote the best interest of the dependent child].)

"[B]est interests is a complex idea" that requires consideration of a variety of factors. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531; see *In re Jacob P.* (2007) 157 Cal.App.4th 819, 832-833.) After the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.) Instead, the focus shifts to the needs of the child for permanency and stability, and a rebuttable presumption arises that continued foster care is in the best interest of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310.) Accordingly, in determining whether a section 388 petitioner has made a prima facie showing that modification is in the child's best interests, the juvenile court may consider the

entire factual and procedural history of the case, including factors such as the seriousness of the reason leading to the child's removal, the reason the problem was not resolved, the passage of time since the child's removal, the relative strength of the parents' and foster parents' bonds with the child, the nature of the change of circumstance, and the reason the change was not made sooner. (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

Elizabeth's petition makes only conclusory allegations that reinstating family reunification services, with its attendant delay in providing Alexander with permanency and stability, would be in his best interests. As discussed, such general assertions are not sufficient to carry Elizabeth's burden to make a prima facie showing that modification would be in Alexander's best interests. (See *In re K.L., supra*, 248 Cal.App.4th at pp. 62-63; *In re Anthony W.*, *supra,* 87 Cal.App.4th at p. 250.)

Alexander was placed in Adriana's home when he was only seven weeks old and he has exhibited a strong attachment to her and her husband. On the other hand, Elizabeth had not had an unmonitored or overnight visit with Alexander in the two years the case had been pending at the time of the section 388 petition. The petition contained no evidence that allowing Elizabeth additional time to address the case issues would override the comfort and security of Alexander's current placement. Accordingly, the petition failed to state a prima facie case that modification was in Alexander's best interests. (See *In re Anthony W., supra,* 87 Cal.App.4th at p. 252 ["children should not be made to wait indefinitely for mother to become an adequate parent"]; *In re Edward H.*, *supra,* 43 Cal.App.4th at p. 594 ["the

prospect of an additional six months of reunification to see if the mother [could comply with her case plan objectives] would not have promoted stability for the children and thus would not have promoted their best interests"].)

2. *The Juvenile Court's Termination of Elizabeth's Parental Rights Pursuant to Section 366.26 Did Not Violate Due Process*

a. *Section 366.26*

The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) Once the court has decided to end parent-child reunification services, the legislative preference is for adoption. (§ 366.26, subd. (b)(1); *In re S.B.* (2009) 46 Cal.4th 529, 532 ["[i]f adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child"]; *In re Celine R.* (2003) 31 Cal.4th 45, 53 ["[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child."]; see *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307 [once reunification efforts have been found unsuccessful, the state has a "compelling" interest in "providing stable, permanent homes for children who have been removed from parental custody," and the court then must "concentrate its efforts . . . on the child's placement and well-being, rather than on a parent's challenge to a custody order"]; see also *In re*

Breanna S. (2017) 8 Cal.App.5th 636, 645-646; *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299-1300.)

Section 366.26 requires the juvenile court to conduct a two-part inquiry at the selection and implementation hearing. First, the court determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250 (*Cynthia D.*); *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory exceptions applies. (§ 366.26, subd. (c)(1)(A) & (B); see *Cynthia D.*, at pp. 250, 259 [when the child is adoptable and declining to apply one of the statutory exceptions would not cause detriment to the child, the decision to terminate parental rights is relatively automatic].)

b. *Due process does not require a finding of parental unfitness by clear and convincing evidence at the section 366.26 hearing*

Parents have a fundamental interest, protected by the due process clause of the Fourteenth Amendment, in the care, companionship and custody of their children. (*Santosky v. Kramer* (1982) 455 U.S. 745, 748 [102 S.Ct. 1388, 71 L.Ed.2d 599] (*Santosky*).) Accordingly, the equivalent of a finding of parental unfitness, established by clear and convincing evidence, is necessary at some point in dependency proceedings as a matter of due process before parental rights may be terminated.

(*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 423; see *Santosky*, at pp. 747-748.)[6]

Relying on *Santosky, supra,* 455 U.S. 745, Elizabeth contends section 366.26 violates her due process rights because it permits the juvenile court to terminate parental rights at the selection and implementation hearing without finding by clear and convincing evidence that return of the child to parental custody would create a substantial risk of detriment to the child. Elizabeth's argument was squarely rejected by the California Supreme Court in *Cynthia D., supra,* 5 Cal.4th 242.

"'In *Santosky v. Kramer, supra*, 455 U.S. 745 the United States Supreme Court considered New York's procedures for the termination of parental rights upon a determination that a child was "permanently neglected." Under New York law a child could be removed from parental custody upon a finding of neglect and the parental relationship could be severed upon a finding of permanent neglect.'" (*Cynthia D., supra,* 5 Cal.4th at p. 250.) Under New York law permanent neglect had to be proven by a preponderance of the evidence. (*Santosky*, at p. 748.) The Supreme Court held that parental rights "'are a fundamental liberty interest and the standard of proof required in an action to

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[6] A finding of detriment to the child if care and custody were returned to the parent corresponds to a finding of parental unfitness and is sufficient to support an order terminating parental rights: "'California's dependency scheme no longer uses the term "parental unfitness," but instead requires the juvenile court make a finding that awarding custody of a dependent child to a parent would be detrimental to the child.'" (*In re Frank R.* (2011) 192 Cal.App.4th 532, 537; accord, *In re D.H.* (2017) 14 Cal.App.5th 719, 731*; In re P.A.* (2007) 155 Cal.App.4th 1197, 1212.)

terminate such rights requires a balancing of the private interests affected, the risk of error created by the state's chosen procedure, and the countervailing governmental interest supporting the procedure.'" (*Cynthia D.,* at p. 251.) After analyzing New York's statutes governing termination of parental rights pursuant to these factors, the Court concluded the New York procedure did not meet due process requirements. The Court held that, "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." (*Santosky*, at pp. 747-748.)

In *Cynthia D.* the California Supreme Court addressed whether California's procedures for termination of parental rights violated the due process principles set forth in *Santosky*. The mother in *Cynthia D.* had filed a petition for writ of mandate a few days before the section 366.26 hearing seeking to have the order setting the section 366.26 hearing vacated. "Mother claimed that the statutory provisions violated due process because they allowed findings of detriment to be made by a preponderance of the evidence rather than by clear and convincing evidence." (*Cynthia D., supra,* 5 Cal.4th at p. 246.)

After reviewing the holding in *Santosky* and the factors it considered, the Supreme Court concluded, "[S]ection 366.26 cannot properly be understood except in the context of the entire dependency process of which it is part. Unlike the termination hearings evaluated in *Santosky v. Kramer, supra*, 455 U.S. 745 . . . the purpose of the section 366.26 hearing is not to accumulate further evidence of parental unfitness and danger to the child, but to begin the task of finding the child a permanent alternative family placement. By the time dependency

proceedings have reached the stage of a section 366.26 hearing, there have been multiple specific findings of parental unfitness. Except for a temporary period, the grounds for initial removal of the child from parental custody have been established under a clear and convincing standard [citation]; in addition, there have been a series of hearings involving ongoing reunification efforts and, at each hearing, there was a statutory presumption that the child should be returned to the custody of the parent. [Citations.] Only if, over this entire period of time, the state continually has established that a return of custody to the parent would be detrimental to the child is the section 366.26 stage even reached. [¶] We therefore conclude that the three factors relied upon in *Santosky v. Kramer, supra*, 455 U.S. 745, to require an elevated standard of proof do not compel the use of that standard in this case under our statutory scheme." (*Cynthia D., supra,* 5 Cal.4th at p. 253, fn. omitted.)

Accordingly, the Court stated, "Considered in the context of the entire process for terminating parental rights under the dependency statutes, the procedure specified in section 366.26 for terminating parental rights comports with the due process clause of the Fourteenth Amendment because the precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents. At this late stage in the process the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must now

align itself. Thus the proof by a preponderance standard is sufficient at this point. [¶] We conclude that the standard of proof for termination of parental rights under the child dependency statutes comports with the requirements of due process." (*Cynthia D.*, *supra,* 5 Cal.4th at p. 256.)

Recognizing the holding in *Cynthia D.* is fatal to her argument, Elizabeth urges us to disregard it as incorrectly decided. However, she has failed to cite any governing case law or statutory enactment overruling or undermining the holding or reasoning in *Cynthia D.* Accordingly, we are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Elizabeth next tries to evade the reasoning of *Cynthia D.* by arguing the Court's statements regarding the constitutionality of section 366.26 are nonbinding dicta because the writ proceeding occurred before the section 366.26 hearing in that case had taken place. While it is true the mother's parental rights had not yet been terminated in *Cynthia D.*, the Court defined the scope of its analysis broadly, stating "The sole issue raised in the petition for review in this case is a due process challenge to the statutory provisions that allow termination of parental rights based on a lesser standard of proof than clear and convincing evidence." (*Cynthia D., supra,* 5 Cal.4th at p. 245.) In reviewing these statutory provisions the Court necessarily considered the constitutionality of section 366.26. (See *In re Brittany M.* (1993) 19 Cal.App.4th 1396, 1399 ["stare decisis compels us to follow *Cynthia D.* [citation], insofar as it holds a preponderance of evidence standard sufficient to meet due process requirements" at a section 366.26 hearing]; see also *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1134 ["[i]n a dependency proceeding, due

process is satisfied if unfitness is established at an earlier stage, and parental rights terminated later based on the child's best interest]; *In re D.H.* (2017) 14 Cal.App.5th 719, 730-731 [detriment finding based on clear and convincing evidence "may be made at the dispositional stage or during a subsequent review period, but it must occur prior to termination"].)

DISPOSITION

The January 13, 2020 orders of the juvenile court denying the section 388 petition for modification of prior court orders and terminating parental rights are affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.